

30. While Complainants argue that their initial builds were completed a long time ago, EAI recently became aware that Comcast, Alliance and WEHCO have undertaken large scale upgrades and rebuilds over the past several years, many of which were conducted without the knowledge or the approval of EAI.⁴⁹ These upgrades and rebuilds involve complete overhauls of Complainants' facilities, requiring them to physically touch virtually every pole to which they are attached either to overlash cable or to upgrade electronics.⁵⁰ No other party on EAI's poles, including EAI itself, has been in contact with the physical pole plant as systematically and uniformly as have Complainants, and the Cable Operators are the last in time to have touched the poles to which they have attachments. If poles were not in compliance with the NESC at the time the Cable Operators sought to upgrade or replace their facilities, they should have notified EAI and/or remedied the non-compliant circumstances.⁵¹ Under no conditions, however should they have proceeded to install or upgrade their facilities.⁵²

31. On or about the time that EAI now understands the Cable Operators began their upgrade and rebuild projects, EAI also began to encounter a considerable number of outages and incident reports stemming from incidents associated with cable television facilities. Linemen called to the scene could generally determine CATV as the culprit due to the physical evidence present upon inspection, including CATV wires on the ground, snagged on trucks, or other pull-downs in

⁴⁹ Declaration of Gary Bettis at ¶ 12; Declaration of Michael Willems at ¶ 14; Declaration of Bernard Neumeier at ¶¶ 13, 14; Declaration of Wayne Harrell at ¶ 22.

⁵⁰ Declaration of John Tabor at ¶ 7.

⁵¹ Declaration of Tony Wagoner at ¶ 23; See Society of Cable Telecommunications Engineers, Inc. – Recommended Practices for General Cable Construction and Testing, Second Edition (2002), Sections 1.4 and 1.5.

⁵² Declaration of Tony Wagoner at ¶ 23.

areas where there are no lines on the poles that are lower than CATV.⁵³ As detailed in the attached charts and outage/trouble reports, these issues were pervasive and caused considerable problems to the electric plant as well as the cable and telecommunications facilities on EAI's poles.⁵⁴ Comcast has even admitted that its upgrade activities were responsible for creating clearance violations,⁵⁵ which in turn generated an increased potential for pull-downs or other damage to poles.

32. Clearly, the course of action taken, including test inspections and full inspections as warranted, was a reasoned and measured response to cure a growing and potentially dangerous trend.

C. Contrary to Complainants' Assertion, Safety Inspections Occasioned by Specific Violations are Neither "Post-Construction" Inspections Nor "Routine" Inspections

33. Complainants assert that the inspections conducted by EAI are actually delayed post-construction inspections, that should be disallowed because they did not occur within one year of the completion of the cable facilities' construction.⁵⁶ Their argument, however, is conclusory and unsupported by anything other than the bare assertion that various facilities were constructed at some time prior to the commencement of the safety inspections conducted by USS on EAI's behalf. Moreover, Complainants' arguments related to the *Knology* decision are completely inapposite to the current situation.

⁵³ Declaration of Jim Lovell at ¶¶ 9, 10.

⁵⁴ See Exhibits "90-93."

⁵⁵ See Comcast Action Plan (Apr. 20, 2001) at Exhibit "21."

⁵⁶ Complaint at ¶¶ 308-317.

34. In the *Knology* case, the survey in dispute was ostensibly a post-construction inspection of newly-installed facilities that had never before been attached to Georgia Power's poles – not, as here, upgrades or rebuilds that were conducted without notifying or seeking the approval of the utility.⁵⁷ Moreover, read closely, it is clear that the holding in the *Knology* case is not as broad as Complainants imply. The FCC did not, for example, establish a blanket rule that all inspections conducted more than one year after a cable is installed are routine inspections, the charges for which must be apportioned among all attachers to the pole. Rather, the Commission found that, *based on the record in that case*, the post-attachment inspection was not solely related to the cable company's attachments.⁵⁸ The Commission emphasized Georgia Power's failure to illustrate that “notwithstanding the fact that it took Georgia Power more than a year to conduct the post-attachment inspection, the inspection nevertheless related solely to Knology's attachments.”⁵⁹ It is clear, therefore, that regardless of *when* an inspection takes place, as verified by the FCC's determination in the *CTAG* case,⁶⁰ where the inspection is shown to benefit, or is occasioned by, the actions of a single attacher, it should logically and equitably be the responsibility of that attacher to absorb the reasonable costs associated with it - regardless of when in time that inspection takes place relative to construction.

35. With the exception of Cox, the inspections conducted here *were not post-attachment inspections of new construction*, and accordingly were not required to be undertaken within a

⁵⁷ *Knology v. Georgia Power, Inc.*, 18 FCC Rcd. 24615, at ¶ 5 (2003) (“*Knology*”).

⁵⁸ *Id.* at ¶ 34.

⁵⁹ *Id.* at ¶ 34.

⁶⁰ *Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333 (2003) (“*CTAG*”).

year of completion.⁶¹ Rather, as illustrated herein, these were safety inspections that were specifically prompted by cable-related outages to EAI electric customers and cable-related trouble tickets.⁶² EAI's concerns regarding the state of Complainants' cable plant were borne out in the test inspections, illustrating pervasive CATV-related safety problems throughout EAI's system resulting from the Cable Operators' failure to construct and maintain their facilities in a safe manner. EAI's inspections therefore were warranted and prompted by specific, documented safety issues associated solely with Complainants' facilities. Inspections of this nature may be conducted outside of the one-year timeframe that Complainants cite, and are provided for in each Complainants' pole attachment contract with EAI.⁶³ Under Complainants' version of the law, a single attacher could never be charged for the entire cost of any inspection that occurs more than one year after construction. This is clearly incorrect, as this would encourage cable companies to "hang it and forget about it," and would impermissibly shift the burden of CATV plant maintenance to electric ratepayers, and prevent utilities from undertaking legitimate investigations into the safety of their plant.⁶⁴

D. Safety Inspection Costs Related to a Particular Company Should be Borne by that Company

36. As Complainants note, if an inspection is designed to yield information about more than cable attachments, and thus to benefit other pole users, the cable company should not be required

⁶¹ As noted previously, the Cable Operators did not give notice to, or seek approval from, EAI when conducting their upgrades and rebuilds. Accordingly, as a practical matter, EAI could not have even conducted inspections within one year of the Cable Operators' activities.

⁶² Declaration of David B. Inman at ¶ 16.

⁶³ *Newport News Cablevision Ltd. v. Virginia Electric and power Company*, 7 FCC Rcd. 2610, at ¶ 10 (1992) (legitimate safety concerns justified a later inspection and was not unreasonable) ("*Newport News*"); Pole Attachment Agreements at Article V (reserving the right to conduct initial and "*periodic*" inspections to ensure attacher's compliance with engineering standards).

⁶⁴ See, *CTAG, supra*.

to bear the cost exclusively. Costs of a pole inspection unrelated to a particular company's attachments should be borne by all attachers.⁶⁵ Of course, the natural corollary to this maxim is that inspections designed to address a single attacher and occasioned by a particular company's attachments *should* be borne solely by that company.⁶⁶ It would be inequitable to require those attachers who are in substantial compliance with safety codes and for which no benefit is derived, including the utility itself, to contribute to the payment of inspection costs occasioned entirely by the Cable Operators' inadequate and dangerous attachment practices.

37. The FCC has specifically taken this position in the past, finding that it is reasonable for a utility to require the attacher responsible for a safety violation to bear the cost of inspections related to that violation. As the FCC stated in *CTAG*:

“[w]e agree with [the utility] that it has the right to inspect its poles to ensure they are compliant with applicable safety standards. Consequently, we do not consider unreasonable a provision allowing inspections when [the utility] ‘discover[s] a safety violation during the previous regular inspection.’ *Nor, in our view, is it unreasonable for the attacher that is responsible for the violation to bear the cost of such an inspection.*”⁶⁷

Moreover, the Bureau acknowledged that safety inspections of this kind are distinct and separate from routine inspections that might otherwise be conducted.⁶⁸ In *Newport News Cablevision v. Virginia Electric and Power Company*, the Common Carrier Bureau also specifically rejected

⁶⁵ *Knology v. Georgia Power* at ¶ 29, citing *First Commonwealth Communications v. Virginia Electric & Power Co.*, Order, 7 FCC Rcd 2610, ¶ 9 (Com. Car. Bureau 1992).

⁶⁶ *First Commonwealth Communications Inc. v. Virginia Electric & Power Co.*, 7 FCC Rcd 2614, ¶ 8 (1992) (“Any cost of inspection designed only to inspect cable attachments should be borne by the cable company.”).

⁶⁷ *CTAG* at ¶ 15 (emphasis added).

⁶⁸ *CTAG* at ¶ 15, cf. *CTAG* at ¶ 16 (noting that *specific* parties that violate safety standards may be held solely responsible for cost attendant on safety inspections, and also noting that costs for routine inspections, as a separate matter, that benefit all attachers should be included in maintenance costs accounts and allocated to each attacher).

cable company claims of a “sham” inspection, and endorsed as reasonable a safety inspection conducted after the results of a pilot safety survey revealed cable-related safety violations.⁶⁹

38. Here, EAI conducted “test inspections” of the facilities of Comcast, Alliance and WEHCO that were specifically prompted by outages and incident reports associated with, and directly attributable to, Complainants’ cable facilities.⁷⁰ Inspection directives and activities conducted at the pole during inspection were specifically designed and intended solely to identify safety issues associated with cable television attachments.⁷¹ If the test inspection had revealed consistent compliance with NESC and contract standards with relatively few safety violations, *EAI would not have proceeded to conduct full scale safety inspections.*⁷² However, this was not the case, as the test inspections revealed widespread and systemic violations by the Complainants of the NESC and the contract standards. In each instance, EAI presented the results of the test inspection to the Complainant, and provided an opportunity for the company to participate in and monitor the full inspection.⁷³ *Without exception*, each Complainant declined to participate in the safety inspections conducted.⁷⁴

39. EAI even went an extra step with Comcast permitting it to develop its own plan to address the safety violations before commencing the test inspection.⁷⁵ Comcast’s efforts, however, were woefully inadequate. Outages persisted even after Comcast purportedly corrected

⁶⁹ *Newport News Cablevision v. Virginia Electric & Power Co.*, 7 FCC Rcd 2610, ¶ 10 (Common Carrier Bureau 1992).

⁷⁰ Declaration of David B. Inman at ¶ 14.

⁷¹ Declaration of David B. Inman at ¶ 14; Declaration of Tony Wagoner at ¶ 6.

⁷² See Declaration of David B. Inman at ¶ 7.

⁷³ In WEHCO’s case, it was also fully aware of the test inspection as well. See Declaration of Michael Willems at ¶ 16.

⁷⁴ Declaration of David B. Inman at ¶ 18; Declaration of Tony Wagoner at ¶¶ 42, 50, 54.

⁷⁵ See Comcast Action Plan at Exhibit “21.”

its plant. EAI discovered, after reviewing the corrections Comcast claimed to have made, that in many instances Comcast had not even begun what it had told EAI it had already completed.⁷⁶

40. The scope of all of the inspections was specifically designed to address the issue of non-compliant *CATV* attachments.⁷⁷ Measurements, where necessary, were only conducted with respect to the relationship between the cable attachment and adjacent attachments to determine where cable attachments had clearance violations.⁷⁸ Measurements were *not* taken for every attachment to the pole, nor were non-CATV attachments otherwise inspected or catalogued.⁷⁹ Where an incidental benefit accrued to EAI or another attacher (*i.e.*, the adjacent attachment was an EAI or telecommunications attachment with a violation), EAI has attempted in good faith to quantify the benefit (as described herein) and has paid its apportioned cost or apportioned such cost to a third party.⁸⁰ EAI has not recovered the inspection costs in any other manner, and costs are not, and have not, been recovered in the annual pole attachment rental fees.⁸¹

⁷⁶ Declaration of Jim Lovell at ¶ 16.

⁷⁷ The work codes cited by the Complainants in Exhibit "30" are *generic* work codes that USS utilizes as billing codes. Line items in the billing associated with a code indicate that at least *one* of the tasks associated with a code was performed. It does *not* mean that all tasks were performed. Here, the scope of work dictated by EAI was specifically limited to measurements, photographs, and safety evaluations for cable television attachments on its poles. See Declaration of David B. Inman at ¶ 15; Declaration of Tony Wagoner at ¶ 6; Declaration of Wilfred Arnett at ¶ 7.

⁷⁸ Declaration of David B. Inman at ¶ 7; Declaration of Tony Wagoner at 6; Declaration of Wilfred Arnett at ¶ 8.

⁷⁹ *Id.*

⁸⁰ Declaration of David B. Inman at ¶ 31.

⁸¹ Declaration of David B. Inman at ¶ 34.

**E. The Terms of the Pole Attachment Agreements Are Reasonable And Have
Been Applied Reasonably in this Instance**

41. The terms of the pole attachment agreements between EAI and the Complainants, which are substantially similar for each of the cable companies at issue, provide EAI with the right to inspect new attachments and to make *periodic* inspections of EAI's facilities to ensure the compliance with applicable constructions standards and codes and to determine if unauthorized attachments have been made.⁸² Where violations are discovered, the contracts provide that EAI has the right to require a full accounting of cable company activity, and to request that a cable company representative be made available to accompany EAI on a complete inspection of all joint use facilities.⁸³ Where a complete safety inspection is necessitated, the attacher is required to reimburse the utility for expenses related to the inspection, and to take "immediate action" to correct any violations identified.⁸⁴ Complainants claim that it has been EAI's "practice" to limit inspections undertaken pursuant to this article of the contract to the make-ready process.⁸⁵ The language of the contract, however, does not so limit the application of this provision. As outlined herein, EAI had specific cause in this instance, due to the high incidence of CATV related outages and trouble reports, to compel correction of the safety violations that were uncovered.

42. While the pole attachment agreements provide that a complete inspection may be required if any provision of the contract is violated, the violations at issue here and the focus of the inspections pertain solely to violations of the safety and construction standards on

⁸² See Pole Attachment Agreement at Article V (Inspection and Audit).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Complaint at ¶ 69.

*Complainants' facilities. In the CTAG case, the Enforcement Bureau specifically endorsed the reasonableness of a requirement that would obligate the attacher to pay for safety inspections occasioned by the attacher's own safety violations.*⁸⁶ That is precisely the factual scenario that has presented itself here, and this is precisely how EAI is implementing the subject provision. EAI's actions, therefore, are appropriate and wholly reasonable. As the agency itself has indicated, it is reasonable for an attacher responsible for safety violations to bear the cost of inspections related to those violations.⁸⁷ Precedent could not be more clear on this point – and EAI's actions are wholly consistent with the FCC's position in this regard.

43. EAI has always expected Complainants and their predecessors to follow the application process for new attachments as set forth in the pole attachment agreements. For all new attachments, the process requires Complainants to submit an application for a permit along with engineering drawings to reflect exact construction of the attachment. EAI would post-inspect new attachments if Complainants notified EAI that construction had been completed. However, EAI rarely received this notification from Complainants. Post inspections when performed, were not limited to attachments which required make-ready work. If properly notified, EAI would perform inspections based on the number of attachments involved, quality of the application and drawings received, the location of the attachments and whether make-ready work was required.

IV. RESPONSE TO CABLE COMPANIES' SPECIFIC ALLEGATIONS

44. The safety inspections were performed only after considered and conscientious attempt by EAI to identify the source of the outages and trouble reports and only after inspections were

⁸⁶ The pole attachment contracts in this case have been in place since well before the *CTAG* decision.

⁸⁷ *CTAG, supra*, at ¶ 15.

conducted on the Comcast, Alliance and WEHCO facilities. In each instance, as noted above, Complainant was presented with the results of the test inspection, and given the opportunity to participate in the safety inspection of its facilities. Each declined.⁸⁸ EAI has made reasonable attempts to accommodate disputes as to particular violations, and has consistently been willing to address case-by-case situations and provide additional engineering and billing information to Complainants.⁸⁹ The response from the other side has been nothing but stonewalling and denial, refusal to pay for fairly allocated expenses, and – worst of all – refusal to rectify ongoing safety violations associated with their plant.

A. Comcast

45. Comcast is attached to 46,421 EAI poles, 4,500 of which contain at least two attachments.⁹⁰ While much of the Comcast plant may have been built prior to 1986, Comcast engaged in a massive overhaul and rebuild of its facilities beginning in 1999, involving the complete replacement or overlash of nearly all of its facilities, including the replacement of strand, hardware, conductors and electronic equipment.⁹¹ Since that time, EAI has recorded a significant number of outages that are directly traceable to low hanging cable facilities, cable facilities on the ground, or other safety issues associated with Comcast's CATV plant.⁹² EAI recorded 555 cases of emergency calls between August 21, 2001 and April 8, 2004 from consumers that turned out to be related to cable television facilities, of which a significant

⁸⁸ Declaration of David B. Inman at ¶ 18. See also footnote 70 and paragraph 35, *supra*.

⁸⁹ Declaration of David B. Inman at ¶¶ 30, 36.

⁹⁰ Declaration of David B. Inman at ¶ 39.

⁹¹ Declaration of Tony Wagoner at ¶ 40.

⁹² Declaration of Jim Lovell at ¶¶ 9, 10; Declaration of G. Bettis at ¶ 13; Comcast Trouble Tickets attached hereto as Exhibit "90."

portion were related to Comcast facilities.⁹³ Further, 13 cases involved outages directly attributable to third parties hitting low-hanging cable television cables during the same time frame.⁹⁴ Upon investigation of these outages, EAI discovered a significant number of engineering violations for cable facilities that are non-compliant with *any* version of the NESC.⁹⁵

46. EAI brought its concerns to Comcast, and the parties met on April 18, 2001, to discuss the outages caused by Comcast's facilities.⁹⁶ Comcast acknowledged past defective construction and delinquent maintenance practices, and pledged to compile an action plan by April 23, 2001 to remediate the cited problems.⁹⁷ Comcast provided its proposed plan to EAI on April 20, 2001, specifically acknowledging that "due to the upgrade of [Comcast's] plant, we have overlashed cable and added additional strand footage causing clearances to be out of specification in some locations" On August 21, 2001, Comcast submitted a letter to EAI stating that it had completed repairs to its facilities ("Follow Up Comcast Action Plan").⁹⁸ Comcast, therefore, was aware of EAI's concerns regarding its engineering practices well in advance of the commencement of any safety inspections initiated by EAI. Outages, however, continued to persist even after Comcast claimed it had corrected its problems. Accordingly, EAI engaged USS to perform an initial test

⁹³ See Comcast Emergency Tickets, Exhibit "90."

⁹⁴ Declaration of Jim Lovell at ¶¶ 9, 10; Comcast Emergency Tickets attached hereto as Exhibit "90."

⁹⁵ Declaration of Wilfred Arnett at ¶ 23.

⁹⁶ Declaration of Gary Bettis at ¶ 14; *See also*, Letter from Wm. Webster Darling to M. Gardner (April 19, 2001), attached hereto as Exhibit "22."

⁹⁷ *Id.*

⁹⁸ See Follow Up Comcast Action Plan (Aug. 21, 2001) attached as Exhibit "23."

inspection of two electric circuits in Comcast's service area. The test inspection revealed a more than 30% violation rate for Comcast's attachments.⁹⁹

47. In January 2002, EAI requested a meeting with Comcast to discuss the results of the test inspection.¹⁰⁰ EAI, USS and Comcast met later that month, at which point EAI indicated to Comcast that, based on the high incidence of violations, a full safety inspection of Comcast's plant was warranted.¹⁰¹ EAI asked for the participation of a Comcast representative, which Comcast declined. Further, EAI also advised Comcast that USS could invoice Comcast directly for safety inspection costs to avoid EAI incurring administrative costs associated with the billing process.¹⁰² EAI further advised Comcast at this meeting if EAI became involved in generating and sending invoices to Comcast for safety inspection costs, Comcast would be billed an additional 5% of the safety inspection costs for EAI's overhead. The overhead costs were later adjusted to 8% on a company-wide basis.¹⁰³ Comcast opted to have EAI process USS' bills, rather than being directly billed.¹⁰⁴ EAI has supplied requested back-up information to Comcast, and as of August 2002 Comcast has been in possession of all of the necessary back up information related to bills issued for safety inspection costs.¹⁰⁵ EAI has also been amenable to reviewing, and has acted on, errors that Comcast has identified in billing, including reducing

⁹⁹ Declaration of Wilfred Arnett at ¶ 27.

¹⁰⁰ Declaration of Gary Bettis at ¶ 14.

¹⁰¹ *Id.*

¹⁰² Declaration of David B. Inman at ¶ 37.

¹⁰³ Declaration of David B. Inman at ¶ 37.

¹⁰⁴ *Id.*

¹⁰⁵ Declaration of David B. Inman at ¶ 30.

invoices where Comcast illustrated that a violation in question related to EAI or communications facilities rather than its own.¹⁰⁶

48. EAI and/or USS and Comcast met consistently over the course of the inspection process to discuss violations, plans for remediation, and post-correction inspections to verify corrections.¹⁰⁷ On at least one occasion, EAI specifically asked Comcast's engineers, including Ronnie Colvin, to conduct a ride-out to view some of the disputed poles, which Comcast declined to do.¹⁰⁸ As of February 27, 2005, however, Comcast has corrected only 6,797 safety violations from a total of 47,413 reported violations.¹⁰⁹

49. Even if violations on telephone company owned poles are not considered, violations on wholly-owned EAI poles amount to 42,789, with only 6,300 corrections made as of February 27, 2005.¹¹⁰ By way of further comparison for the sake of argument, even if one accepts as true that EAI's contract standards should not be applied and only the minimum NESC standards should be enforced, Comcast would *still* have more than 41,215 NESC-only violations associated with its facilities on wholly-owned EAI poles – a staggering amount.¹¹¹

50. The sheer magnitude of the violations present on Comcast's facilities, and those of the other Cable Operators, is graphically represented and readily apparent as illustrated in a series of

¹⁰⁶ Letter from D. Inman to R. Colvin (Aug. 30. 2002), attached as Exhibit "24."

¹⁰⁷ Declaration of Tony Wagoner at ¶ 26.

¹⁰⁸ Declaration of Tony Wagoner at ¶ 47.

¹⁰⁹ See Comcast Violation Progress Report attached as Exhibit "82."

¹¹⁰ Declaration of Wilfred Arnett at 33, Attachment C.

¹¹¹ Declaration of Wilfred Arnett at Attachment B.

circuit maps appended hereto as Exhibit 94.¹¹² These maps, and the accompanying spreadsheets, illustrate in detail each violation for each Complainant. Should Comcast or any other Cable Operators dispute the determination of a violation or the allocation of responsibility for correction, every scrap of data needed to do so is present in these volumes, and has all been presented to the Cable Operators before. Their continued reliance on speaking in generalities, therefore, is wholly unjustified in light of the tools and data that has been available to them all along. Moreover, it is precisely this level of detail that is necessary when evaluating the safety of an installation, as each pole must be considered as an issue unto itself. It is utterly inappropriate, and simply illogical, to claim that Pole A must be safe because Pole Z is safe. There are too many variables to make such assumptions. Each pole must be evaluated according to its unique physical environment, including the geography, attachments, the characteristics of the pole itself, and the like.

51. Moreover, many, if not all, of the reported safety violations should have been identified and reported by Comcast to EAI pursuant to standard industry practice as part of the upgrade performed by Comcast which began in 1999.¹¹³ Comcast, however, did not report any safety issues to EAI over the course of its upgrade, as it was required to do. Industry practice does not permit additional attachments to, or upgrades on, non-compliant poles. If Comcast did so without correcting its own plant or notifying EAI that a correction needed to be made to a third party or EAI attachment, Comcast again violated NESC guidelines and other standards of

¹¹² Note that due to an anomaly in the printing, where there are multiple violations on a pole the pole will only be represented by a single symbol (star or square), but not both. Accordingly, the legend for the map may not strictly track the symbols graphically present on a map. The legend, however, is accurate, and provides an accurate tally of the violations that are detailed in the spreadsheets accompanying each map.

¹¹³ Declaration of Tony Wagoner at ¶ 23.

engineering by proceeding with its upgrade.¹¹⁴ Moreover, personnel implementing the upgrade were specifically directed not to measure or record any violations observed while working on Comcast facilities as a part of the upgrade.¹¹⁵ Given that Comcast touched all of its facilities during the upgrade and deliberately avoided its obligations to ensure poles were safe and NESC-compliant prior to their upgrade activities, and given that Comcast reported no violations to EAI at the time of its upgrade, it is clear that post-upgrade violations identified by USS are necessarily the responsibility of Comcast. That is, logically and necessarily, either Comcast attached or upgraded its facilities on a non-compliant pole without correcting or without notifying EAI to make corrections -- which is a violation itself -- or Comcast created the violation through its upgrade activities. Either way, Comcast is therefore the responsible party.

52. Moreover, Comcast has been repeatedly advised that if it disputes any specific findings of USS regarding safety violations, these matters should be brought to the attention of USS on a case-by-case basis and resolved.¹¹⁶ Comcast was further advised that if Comcast obtains sign off from an Arkansas-licensed professional engineer that a cited violation is (i) not a violation under the NESC; (ii) grandfathered under a previous edition of the NESC and need not be brought up to the current NESC edition; or (iii) that the subject violation was not caused by the cable company, EAI would consider the violation resolved. This is the same process and standard that EAI undertakes itself when it disagrees with a violation USS has identified with respect to EAI's own plant. In any event, where reasonable professionals may differ on the interpretation of the NESC, it is inappropriate to place the onus on EAI to make judgment calls as to the safety and

¹¹⁴ Declaration of Tony Wagoner at ¶ 23.

¹¹⁵ Declaration of John Tabor at ¶ 8; Declaration of Brent Lewis at ¶ 4.

¹¹⁶ Declaration of David B. Inman at ¶ 36; Declaration of Wilfred Arnett at ¶ 31; Declaration of Tony Wagoner at ¶ 45.

compliance of a Complainant's facilities. This could impermissibly shift the liability to EAI and its ratepayers should an accident or other incident occur involving the facilities in question.¹¹⁷

53. To date, however, Comcast has contested very few violations and continues to speak in broad generalities concerning its objections to particular classes of violations rather than specifically addressing its objections to an individual pole violation.¹¹⁸ In fact, through *weekly* meetings between USS and Comcast personnel including James Peacock through May 28, 2003, Comcast had only identified 319 disputed violation citations – hardly a significant amount given the volumes of violations that had been cited to Comcast at that time.¹¹⁹ Nevertheless, Comcast has continued to balk at any efforts by EAI and USS to secure prompt correction of the thousands of undisputed violations.

1. Comcast's Violations

a. Clearances

54. The majority of Comcast's violations – approximately 62% - are in the nature of clearance violations, either separation at the pole or mid-span. As of February 28, 2005, USS had identified 29,398 such violations, of which Comcast has corrected a mere 4,201 (14 %).¹²⁰

¹¹⁷ For example, the NESC dictates that guy markers are required in any area "subject to pedestrian traffic." Subsection 264 E.1. Pedestrian traffic, however, is not defined by the NESC. EAI has made its own conservative judgment as to the meaning of the term with respect to its facilities, but is not equipped, nor should it be required, to make the same kind of judgment on behalf of a third party that could also be subject to liability. This potential for liability is also not academic, as the Cable Operators' "expert" Michael Harrelson is well aware. *See*, Harrelson C.V. Exhibit "15", Item 16, p. 3 *Lockhart v. TCI Cable and BellSouth* (Superior Court, Tooms Co., GA) (motorcyclist struck in neck by unmarked guy wire).

¹¹⁸ Declaration of Wilfred Arnett at ¶ 32.

¹¹⁹ See Comcast Disputed Pole Violations, prepared by James Peacock (May 28, 2003), attached hereto as "25."

¹²⁰ Declaration of Wilfred Arnett at Attachment C.

Comcast's objection to these violations, however, is simply that "many of these either were not caused by Comcast or are not real NESC violations."¹²¹ This general accusation is supported only by a similarly conclusory statement by declarant Marc Billingsly.¹²² While general, this statement is a prime example of how Complainants have gone about addressing the cited violations – with little or no detail or specificity. Eliminating non-EAI poles from this analysis, this still amounts to 26,445 violations, with only 3,904 corrections by Comcast.¹²³ Furthermore, even assuming for the sake of argument that Comcast was entitled to take advantage of *every one* of the exceptions to the general NESC separation requirements at the pole or at mid-span, discussed above, Comcast facilities would *still* have 24,871 clearance violations present.¹²⁴ This is clearly a tremendous problem. Therefore, the agency must require immediate action on Comcast's part.

b. Anchors

55. As of February 28, 2005, USS identified 5,745 Comcast violations relating to installation of anchors. Of these, only 1,175 have been corrected by Comcast.¹²⁵ Moreover, while Comcast would have the Commission believe that in most instances EAI had sought to require superfluous work by having Comcast remove its guys from EAI anchors and to install its own anchors, approximately one half of the anchor-related violations are for locations where Comcast has *no guy wire or anchor at all* to support the unbalanced load on the pole caused by Comcast's

¹²¹ Complaint at ¶113.

¹²² Declaration of Marc Billingsly, Complaint Exhibit "6" at ¶ 20.

¹²³ Declaration of Wilfred Arnett at Attachment C.

¹²⁴ *Id.* at Attachment B.

¹²⁵ Declaration of Will Arnett at Attachment C.

attachments.¹²⁶ The balance of Comcast's anchoring violations are for locations where Comcast has "piggy-backed" their guy wire onto EAI's anchor without permission and *without performing any load analysis to determine whether the additional load violates the NESC.*¹²⁷ An overloaded anchor could either break or pull out of the ground which could in turn result in poles breaking or whole pole lines collapsing.¹²⁸ When only EAI poles are considered in the analysis without any SBC-owned poles, anchoring violations still amount to 5,261 violations with Comcast only making 1,089 corrections.¹²⁹ As EAI's anchoring requirement conforms to the NESC, these numbers are the same whether one is considering violations of the pole attachment agreement or evaluating NESC violations independent of the contract standards.¹³⁰

56. Since the inception of the pole attachment agreement, as evidenced by Section 2.4(d), EAI has required special written permission before a cable company may attach its guy wires to an EAI anchor. Written permission is necessary to ensure that the additional load placed on EAI anchors does not exceed the permitted load requirements of Section 26 – Strength Requirements of the NESC.¹³¹ EAI has never given written *or* verbal permission to Comcast or its predecessors in interest to attach to EAI anchors.¹³² Furthermore, the right to attach to EAI

¹²⁶ Declaration of John Tabor at ¶ 13; Declaration of Tony Wagoner at ¶ 47.

¹²⁷ Declaration of John Tabor at ¶ 13. Performing such an analysis to take advantage of the piggy-backing provision in the first instance is also inefficient from a cost perspective; rather, it is much more cost-effective for the cable company to install its own anchors where anchoring is required.

¹²⁸ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc. at ¶ 40.

¹²⁹ Declaration of Wilfred Arnett at Attachment C.

¹³⁰ Declaration of Wilfred Arnett at Attachment B.

¹³¹ Declaration of David Kelley at ¶ 3; Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc. at ¶ 61.

¹³² Declaration of Gary Bettis at ¶ 24; Declaration of Bernard Neumeier at ¶ 20; Declaration of Wayne Harrell at ¶ 15.

anchors has been previously granted to the telephone companies attached to EAI's poles through a joint use agreement that pre-dates all of Complainants' pole attachment agreements. As the FCC has held in the past, a party is not required to violate the terms of other pole attachment agreements in order to accommodate other relationships.¹³³ The anchoring violations, therefore, were validly identified and should be promptly remedied.

c. Bonding

57. USS identified 6,940 Comcast violations related to bonding. To date, only 671 of these have been corrected by Comcast. Again, excluding non-EAI poles from the analysis, this changes the total only minimally to 6,444 violations, and 646 corrections made by Comcast.¹³⁴ The number of bonding violations does not change when applying the standards of the NESC versus EAI's pole contract standards, as Comcast cannot demonstrate that any pole cited for a bonding violation complies with any edition of the NESC. The cost of materials to make a bond to a vertical ground wire is \$1.00. Comcast would rather incur the time and expense to somehow dispute these violations than make simple inexpensive corrections to improve safety and reliability.

58. Under Section 2.7 of the pole attachment agreement and EAI's engineering standards, Comcast is required to install a bonding wire on every pole where a vertical ground wire exists. Requiring more than four grounds in a mile is a reasonable standard for reasons of safety and

¹³³ *Newport News* at ¶ 16

¹³⁴ Declaration of Wilfred Arnett at Attachment C.

reliability.¹³⁵ The cable industry's own industry-wide safety manual specifies that when addressing bonding the utility's specifications should be followed. Section 6.9 of the Recommended Practices for Coaxial Cable Construction and Testing, Second Edition, published by the Society of Telecommunications Engineers, provides that "the messenger of the coax cable shall be bonded to the telephone strand or other existing pole grounds in accordance with the utility company pole-lease agreement."¹³⁶

59. Moreover, requiring bonding on every pole where a vertical ground wire exists ensures that servicemen of EAI and non-qualified personnel of Complainants, contractors and subcontractors are protected from injury that may be caused by electrical potentials. Bonding cable plant to each of EAI's vertical grounds ensures that the cable plant does not become energized by accident or due to the placement of a cable too close to power facilities without having a direct and safe path to bleed the unwanted electricity to ground. This also ensures that there is no difference in electrical potentials between the facilities at the pole for reliability purposes.¹³⁷ Section 2.7 of the pole attachment agreement further provides that the Complainants are responsible for instructing their personnel working on EAI poles of the dangers involved in bonding their wires to EAI's vertical ground wires and to furnish adequate protective equipment to their personnel to prevent bodily harm.

¹³⁵ Declaration of John B. Dagenhart, Chair of Subcommittee 2 – Grounding of the Institute of Electrical and Electronics Engineers, Inc., at ¶ 15; Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc. at ¶¶ 55-56.

¹³⁶ Society of Cable Telecommunications Engineers, *Recommended Practices for Coaxial Cable Construction and Testing*, at 6.9 (2002).

¹³⁷ Declaration of John Dagenhart at ¶ 16.

d. Service Drops

60. USS identified 8,795 violations reported to Comcast relating to service drops, of which only 1,104 have been corrected by Comcast.¹³⁸ Of the total service drop violations, 4,508 involve separation violations between the drop and an energized facility at the pole. Also, 1,379 of these violations involve mid-span separations between the drops and power conductors – a condition that is never in compliance with the NESC. Again, EAI and USS have repeatedly advised Comcast that if their engineers dispute a particular violation, EAI and USS will consider these violations resolved on a case-by-case basis, provided that a professional electrical engineer licensed in the State of Arkansas certifies in writing that there is no violation.

e. Guy Markers

61. There were 3,923 violations reported to Comcast relating to guy markers of which 559 have been corrected by Comcast.¹³⁹ Disregarding non-EAI poles, guy marker violations still amount to 3,404 violations, of which Comcast has corrected 490. Again, there is no difference between violations under the contract versus the NESC.

62. The locations which were considered violations were in EAI's and USS's judgment subject to pedestrian traffic and under the NESC require the placement of guy markers on the downed guy wires for purposes of visibility and to protect the public.¹⁴⁰ Again, EAI and USS have repeatedly advised Comcast that if its engineers dispute a particular violation, EAI and USS will consider these violations on a case-by-case basis provided that a professional electrical

¹³⁸ See Declaration of Wilfred Arnett at Attachment C. Service drop violations are not separately categorized by EAI, and are included in the clearance violations discussed *supra*.

¹³⁹ Declaration of Wilfred Arnett at Attachment C.

¹⁴⁰ Declaration of Tony Wagoner at ¶ 47.

engineer licensed in the State of Arkansas certifies in writing that there is no violation (*i.e.*, the subject location is not subject to pedestrian traffic).

B. Alliance

63. EAI's efforts with respect to Alliance have paralleled those for Comcast. Unfortunately, the resistance and denial on the part of Alliance have also mirrored Comcast's refusal to rectify safety violations, refusal to identify specific violations that they dispute, and refusal to pay any portion of their allocated share of a safety inspection occasioned solely because of Alliance's safety violations and improperly constructed plant.¹⁴¹

64. Alliance has attachments on 8,517 poles in the area of Plumerville and Greenbrier, Arkansas. Between 1998 and 2002, EAI documented 32 outages or serviceman trips attributable to attachment violations on the part of Alliance. Prior to the test safety inspection, EAI construction personnel were often required to respond to problems caused by Alliance once or twice a week.¹⁴² In early 2001, more than a year before engaging USS to conduct the test inspection, EAI's Brad Welch contacted Jeff Browers with Alliance regarding Alliance's attachment safety violations in its service area and the repeated outages and service calls. At that time, Mr. Welch offered to work with Alliance in correcting the numerous violations in those circuits. Despite that good faith offer, Alliance never responded and did not correct the violations.¹⁴³ EAI accordingly proceeded to have USS conduct a test inspection in the two referenced communities in July 2002, and discovered a violation rate of more than 25%. This inordinate number of violations justified a full inspection of Alliance's attachments. While

¹⁴¹ Declaration of David B. Inman at ¶ 31.

¹⁴² Declaration of Bernard Neumeier at ¶ 18.

¹⁴³ Declaration of Brad Welch at ¶ 10.

Alliance was encouraged to participate and ride along with the USS auditors for the full inspection, Alliance refused to participate.¹⁴⁴ Thereafter, Alliance was provided a list of the violations. In subsequent meetings, Alliance was repeatedly informed that if it disagreed with any of the violations, it could meet with EAI and/or USS and demonstrate that the violations were not the fault of Alliance. Again, Alliance refused to participate in this process.¹⁴⁵

1. Alliance's Violations

65. The full inspection uncovered 7,306 safety violations present on Alliance's facilities. As of February 27, 2005, 6,022 of the 7,306 violations remain uncorrected.¹⁴⁶ Accounting for non-EAI poles inspected changes the tally only minimally. With respect to EAI owned poles, Alliance's plant had 7,259 violations, with 5,981 remaining uncorrected as of February 27, 2005.

a. Anchors

66. USS noted 690 instances where Alliance had improperly attached its cable guys to EAI anchors, to which EAI never consented. Alliance has corrected only 150 of these violations. Again, if non-EAI poles inspected are eliminated from consideration, anchor violations for Alliance still amount to 688 violations, with only 146 corrections made.¹⁴⁷

67. As noted above, attaching the cable guys to EAI anchors does not comply with the NESC, or the contract terms. In order to comply with the NESC, a pole loading study must be performed to determine if the existing anchor's size, depth and soil conditions are sufficient to

¹⁴⁴ Declaration of Tony Wagoner at ¶ 49; Declaration of Bernard Neumeier at ¶ 22.

¹⁴⁵ Declaration of Tony Wagoner at ¶ 50.

¹⁴⁶ Declaration of Wilfred Arnett at Attachment C. See Declaration of Wilfred Arnett at Attachment B.

¹⁴⁷ As above, there is no difference in comparing NESC cited violations to contract violations, as these are identical.

allow another attachment on EAI anchors. Furthermore, the right to attach to EAI anchors was already given to joint use utilities (phone companies).¹⁴⁸ However, due to variations in pole loading and other field conditions, the anchors cannot be assumed to be adequate to carry the tension of multiple wires attached to a pole. Each case would require a pole loading study to determine if the anchor was adequate to carry an additional tension from the cable company's messenger wire. Otherwise, the guy utilized by Alliance must have its own anchor. To the best of EAI's knowledge, Alliance has not conducted such studies.¹⁴⁹

b. Bonding

68. Of the total violations noted during the safety inspection, 1,582 violations were identified as improper bonding of Alliance's cable facilities to EAI grounds in violation of the Alliance Agreement *and* applicable NESC requirements.¹⁵⁰ Alliance has corrected only 674 of these bonding violations.¹⁵¹ Very minimal changes to these numbers occur when only considering EAI-owned poles (1,575 violations and only 661 corrections). As illustrated herein, requiring bonding in each instance where an EAI vertical ground exists is a necessary and prudent requirement that is designed to ensure the safety of all those who must work in proximity to EAI's energized plant, and should be enforced with respect to Alliance and each of the other Complainants.

¹⁴⁸ Declaration of David B. Inman at ¶ 43.

¹⁴⁹ Declaration of Bernard Neumeier at ¶ 20.

¹⁵⁰ See Declaration of Wilfred Arnett at Attachment C. While Alliance alleges that it has been cited for more than 4200 bonding violations, EAI is unsure of where it is obtaining these numbers.

¹⁵¹ *Id.*

c. Clearances

69. Like Comcast, clearance violations account for the majority of violations on Alliance's facilities – approximately 56.6%. This amounted to 4,135 clearance violations for Alliance including both at-pole and mid-span violations, of which only 383 have been remedied.¹⁵² Reviewing EAI-owned poles only, this changes minimally to 4,106 violations with 378 corrections as of February 27, 2005.¹⁵³ If only the bare minimum of the NESC is applied, Alliance's clearance violations *still* total 3,721 violations.¹⁵⁴ Also, like Comcast, Alliance's objections to cited clearance violations are entirely vague – alleging only that “many” were either not caused by Alliance or are “not real NESC violations.”¹⁵⁵ This is hardly a sufficient basis to make an analysis as to the legitimacy of Alliance's grievances.

C. WEHCO

70. WEHCO followed the pattern of the other Complainants, and has failed to take action to address the safety issues present on its facilities. EAI's concerns with the safety and engineering stability of WEHCO's plant dates back several years, as EAI has documented a number of disputes and discussions with WEHCO since 1997, including damage to EAI facilities resulting in outages, attachments failing to meet EAI and/or NESC guidelines, failure to submit attachment requests in the form provided by the WEHCO Agreement, unpaid invoices, and unreported attachments resulting in back-billing.¹⁵⁶ By way of further example, in July and August of 2002, WEHCO made application to attach to 61 poles along Dollarway Road in its

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* At Attachment B.

¹⁵⁵ Complaint at ¶ 144.

¹⁵⁶ Declaration of Michael Willems at ¶ 11, Exhibits “46-51.”